



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 16, 1993

David R. Smith, M.D.  
Commissioner of Health  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR93-301

Dear Dr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 19220.

The Texas Department of Health (the "department") has received two requests for information relating to the department's evaluation of two nursing home facilities. Specifically, the requestor seeks "copies of the worksheets, notes (typed or handwritten), reports and any other records, documents, and working papers completed by the surveyors/investigators during their January 26, 1993[,] through January 29, 1993, visit to Retama Manor West-Victoria." In addition, the requestor seeks "copies of the Complaint Investigation Report, the second page of the Report of Contact, worksheets, notes (typed or handwritten), reports and any other records, documents and working papers completed by the investigators during their November 3-5, 6, 9, 10, 12, 13, 16-18, 1992, and February 18, 1993, visit to Pavilion Nursing Home in McKinney." We understand that you have released to the requestor all of the requested documents except for any notes the surveyors made and kept. You have submitted to us for review representative samples of documents responsive to the request. You claim that this information is not subject to the Open Records Act. In the alternative, you claim that section 3(a)(3) of the Open Records Act excepts the documents from required public disclosure.

The department must make a good faith effort to determine what documents in its custody are responsive to the request. Open Records Decision No. 561 (1990) at 8. We note that some of the information submitted to us for review does not appear to be responsive to the requests for information. The requests appear to encompass only information investigators completed during two specified time periods. However, some of the records submitted to us for review appear to be handwritten notes of telephone interviews conducted outside of these time periods. We have marked these documents for your convenience. While this office normally does not determine the responsiveness of documents to a request, we decline here to render a decision regarding the applicability of

the Open Records Act to the marked documents. We presume, however, that the remaining documents are responsive to the request.

As a threshold issue, we must consider whether the information at issue here is subject to the Open Records Act. You claim that the submitted documents are not subject to the Open Records Act because they constitute "personal notes of the Department's employees, which are used in writing the final investigative report, but which are not maintained in any form by the employee nor by the Department."<sup>1</sup> Section 3(a) of the Open Records Act provides:

[a]ll information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public . . . .

Notes that government officers and employees take in the course of their employment to assist them in their public duties are not truly personal. Thus, such "personal notes" in the physical possession of a governmental body are "public information" subject to the Open Records Act. *See* Open Records Decision No. 549 (1990) at 4. Only if the "public information" comes within one of the exceptions provided by the legislature may a governmental body withhold the information from required public disclosure. *Id.*

Governmental employees generated the information at issue here which relates to the transaction of official governmental business. The fact that the records are handwritten or were generated only for purposes of facilitating generation of another record is completely immaterial. Because you have submitted representative samples of the requested information to us for review, we presume that this information is in your actual or constructive possession. Accordingly, we conclude that the requested information is subject to the Open Records Act. We thus consider whether any exceptions under section 3(a) apply.

You claim that section 3(a)(3) excepts the requested information from required public disclosure. Section 3(a)(3) excepts

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<sup>1</sup>We note that a governmental body may not destroy or alienate its public records except as provided by statute. *See generally* Attorney General Opinion JM-830 (1987); MW-327 (1981). Sections 441.031 through 441.062 of the Government Code provide for the management, preservation, and destruction of state records under the guidance of the Texas State Library and Archives Commission and the records management division of the library. *See, e.g.,* Attorney General Opinions JM-1013 (1989); JM-229 (1984); H-917 (1976). A governmental body may not destroy records even pursuant to statutory authority while they are subject to an open records request. Open Records Decision No. 505 (1988).


information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Section 3(a)(3) applies when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). The litigation exception may be applied to records relating to a contested case before an administrative agency subject to the Administrative Procedure and Texas Register Act ("APTRA"), V.T.C.S. article 6252-13a. Open Records Decision Nos. 588 (1991); 368 (1983). This office determines whether a governmental body reasonably may anticipate litigation on a case-by-case basis. Open Records Decision No. 452 (1986). A governmental body's mere contemplation of future litigation is not sufficient to invoke section 3(a)(3). Open Records Decision No. 557 (1990).

You advise us that the department surveyed Retama Manor West-Victoria, a nursing facility, and discovered a number of violations and deficiencies. You also advise us that the investigative team has recommended termination of the facility's certification to participate in the Medicaid program at the end of ninety days unless the facility corrects the deficiencies. After the effective date of the termination of certification, the facility may request a formal hearing in accordance with title 25 of the Texas Administrative Code section 145.146(b). The hearing is governed by APTRA. You advise us that the Retama Manor West-Victoria nursing facility has corrected the violations and deficiencies and that the department has not terminated the facilities certification. Furthermore, we understand that the department has removed its recommendation to terminate Pavilion's certification. As you have not demonstrated that litigation is pending or anticipated, we conclude that the department may not withhold the requested information under section 3(a)(3) of the Open Records Act and must release it in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

  
Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee

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Ref.: ID# 19220  
ID# 19619  
ID# 19541  
ID# 19671  
ID# 19770  
ID# 19660

Enclosures: submitted documents

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